Supreme Court, U.S.
FILED
98 558 OCT 1 - 1998
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

DALE FURBY,

Petitioner,

v.

UNITED AUTO WORKERS and
CHRYSLER CORPORATION,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF MICHIGAN**

PETITION FOR WRIT OF CERTIORARI

GREGORY T. ZALECKI
Counsel of Record
ZALECKI AND BAIR, P. C.
12900 HALL RD., SUITE 415
STERLING HEIGHTS, MI 48313
(810) 254-6113

Attorney for Petitioner

43 pp

QUESTIONS PRESENTED FOR REVIEW

1.

IS A STATE LAW HANDICAP DISCRIMINATION CLAIM BY A UNION MEMBER AGAINST HIS UNION PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHEN THAT CLAIM CAN BE RESOLVED WITHOUT INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND WHEN THE UNION IS ACTING IN THE CAPACITY OF AN EMPLOYER WITH RESPECT TO THE UNION MEMBER?

2.

DOES THE FEDERAL "CONTINUING VIOLATIONS DOCTRINE" PRECLUDE A STATUTE OF LIMITATIONS DEFENSE AS TO A CURRENT EMPLOYEE REMOVED FROM A DESIRABLE POSITION OUTSIDE OF THE LIMITATIONS PERIOD FOR DISCRIMINATORY REASONS WHEN THAT EMPLOYEE CONTINUOUSLY SEEKS AND IS DENIED REINSTATEMENT TO THE DESIRABLE POSITION WITHIN THE LIMITATIONS PERIOD?

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . -v-

STATEMENT OF OPINIONS BELOW . . . . . -1-

STATEMENT OF JURISDICTIONAL BASIS . . . . . -1-

STATUTES INVOLVED . . . . . -1-

STATEMENT OF THE CASE . . . . . -3-

REASONS FOR GRANTING THE WRIT . . . . . -5-

1. A STATE LAW HANDICAP DISCRIMINATION CLAIM BY A UNION MEMBER AGAINST HIS UNION IS NOT PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHEN THAT CLAIM CAN BE RESOLVED WITHOUT INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND WHEN THE UNION IS ACTING IN THE CAPACITY OF AN EMPLOYER WITH RESPECT TO THE UNION MEMBER? . . . . . -5-

2. THE FEDERAL "CONTINUING VIOLATIONS DOCTRINE" PRECLUDES A STATUTE OF LIMITATIONS DEFENSE AS TO A CURRENT EMPLOYEE REMOVED FROM A DESIRABLE POSITION OUTSIDE OF THE LIMITATIONS PERIOD FOR DISCRIMINATORY REASONS WHEN THAT EMPLOYEE CONTINUOUSLY SEEKS AND IS DENIED REINSTATEMENT TO THE DESIRABLE POSITION WITHIN THE LIMITATIONS PERIOD. . . . . -8-

a. MICHIGAN APPLIES THE FEDERAL CONTINUING VIOLATION DOCTRINE TO DISCRIMINATION CLAIMS ..... -8-

b. THE TRIAL COURT MISCONSTRUED THE CONTINUING VIOLATIONS DOCTRINE ..... -8-

c. A CHALLENGE TO SYSTEMATIC DISCRIMINATION IS ALWAYS TIMELY IF BROUGHT BY A PRESENT EMPLOYEE ..... -9-

d. THIS CASE IS INDISTINGUISHABLE FROM *ROBSON* ..... -10-

e. CHRYSLER'S REFUSAL TO REINSTATE FURBY INTO THE SKILLED TRADES PROGRAM CONSTITUTES A PRESENT A VIOLATION ..... -11-

CONCLUSION ..... -11-

APPENDIX

APPENDIX A

August 28, 1998 Michigan Supreme Court Order Denying Petitioner's Motion for Reconsideration 1a

APPENDIX B

June 29, 1998 Michigan Supreme Court Order Denying Petitioner's Application for Leave to Appeal 2a

APPENDIX C

August 6, 1997 Michigan Court of Appeals Order Denying Petitioner's Motion for Rehearing 3a

APPENDIX D

May 30, 1997 Decision of the Michigan Court of Appeals 4a

APPENDIX E

October 25, 1995 Trial Court Order Granting Chrysler's Motion for Summary Disposition 13a

APPENDIX F

September 15, 1995 Transcript Excerpt Relating to Chrysler's Motion for Summary Disposition 15a

APPENDIX G

February 17, 1995 Trial Court Order Granting the UAW's Motion for Summary Disposition 19a

APPENDIX H

February 17, 1995 Trial Court Transcript Relating to UAW'S Motion for Summary Disposition 20a

APPENDIX I

Excerpts from Plaintiff's Amended Complaint and the UAW's Answer to Complaint 23a

TABLE OF AUTHORITIES

CASES

Allis-Chalmers Corp v *Lueck*,
471 US 202, 211; 105 S Ct 1904, 1911; 85 L Ed 2d 206 (1985) . . . . . -5-

Caterpillar, Inc v *Williams*,
482 US 386; 107 S Ct 2425; 96 L Ed 2d 318 (1987) . . . . . -5-

International Bhd of Elec Workers v *Hechler*,
481 US 851, 859 n.3; 107 S Ct 2161, 2166-67 n.3; 95 L Ed 2d 791 (1987) . . . . . -5-

Lingle v *Norge Div of Magic Chef, Inc*,
486 US 399; 108 S Ct 1877, 1885; 100 L Ed 2d 410 (1988) . . . . . -5-

Reed v *Lockheed Aircraft Corp*, 613 F2d 757 (CA 9, 1980) . . . . . -9-

Smolarek v *Chrysler Corp*,
879 F2d 1326 (CA 6, 1989 en banc) . . . . . -5-, -7-

Sumner v *Goodyear Tire & Rubber Co*,
427 Mich 505; 398 NW2d 368 (1987) . -8-, -9-, -11-

STATUTES

28 U.S.C. § 1257 . . . . . -1-

29 U.S.C. § 185 (§ 301 of the Labor Management Relations

Act) ..... -1-, -5-

MCL 37.1101 et seq; MSA 3.550(101) et seq ..... -3-

MCL 37.1205; MSA 3.550(205) ..... -6-

STATEMENT OF OPINIONS BELOW

None of the opinions and orders entered in this case have been published. Attached as Appendix D is the May 30, 1997 unpublished decision of the Michigan Court of Appeals. The appendix also contains copies of other unreported decisions and orders relating to this case.

STATEMENT OF JURISDICTIONAL BASIS

Petitioner seeks review of the June 29, 1998 denial of his Application for Leave to Appeal by the Michigan Supreme Court. Appendix B. The Michigan Supreme Court denied petitioner's Motion for Reconsideration on August 28, 1998. Appendix B.

28 U.S.C. § 1257 authorizes this Court to review on a writ of certiorari the order of the Michigan Supreme Court.

STATUTES INVOLVED

29 U.S.C. § 185 (§ 301 of the Labor Management Relations Act)

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization

· (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

· (d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or

subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

Petitioner, Dale Furby, is currently employed by Chrysler Corporation as an unskilled labor. He is a member of the United Auto Workers ("UAW") labor union. His employment with Chrysler Corporation is governed by a collective-bargaining agreement between the UAW and Chrysler.

Furby was admitted as an apprentice to the Chrysler skilled trades program in 1986. He was removed from that program for the ostensible reason of poor performance on June 21, 1991. Furby filed suit in state court alleging that his removal from the skilled trades program was based upon an actual or perceived mental handicap which was unrelated to his ability to perform his job in violation of the Michigan Handicappers Civil Rights Act of ("HCRA"). MCL 37.1101 et seq; MSA 3.550(101) et seq.

Furby was removed from the skilled trades program by a committee comprised of equal numbers of members from the UAW and Chrysler management. In its answer to Furby's complaint the UAW has admitted that it jointly administered the skilled trades program and affirmed Furby's dismissal from that program. Appendix I.

Furby filed his state law HCRA claim on June 17, 1994. The statute of limitations applicable to that claim is three years. Thus there is no question but that Furby's suit against the UAW is timely. However, the timeliness of Furby's suit against Chrysler has been questioned. Chrysler was brought into the suit by way of an amended complaint filed on August 30, 1994 – more than three years after Furby's removal from the skilled trades program.

The UAW filed a motion for summary disposition in the trial court alleging that Furby's HCRA claim was preempted by

§ 301 of the LMRA. Furby contended that his state law rights under HCRA could be enforced without referring to or interpreting the collective bargaining agreement between Chrysler and the UAW. The trial court granted the UAW's motion and dismissed Furby's HCRA claim against the UAW on the basis of federal preemption. In an unpublished opinion the Michigan Court of Appeals affirmed. Appendix D. The Michigan Supreme Court denied Furby's Application for Leave to Appeal.

Chrysler brought a motion for summary disposition in the trial court alleging that Furby's HCRA claim against it should be dismissed because it was filed after the expiration of the three year statute of limitations. Furby contended that the federal "continuing violations doctrine" applied to preclude dismissal based upon the statute of limitations. He argued, that as a current employee of Chrysler, he was subjected to a continuing HCRA violation because of the defendants' refusal to allow him back into the skilled trades program.

Furby's claim against the UAW should not have been held to have been preempted by federal law because it was not necessary to interpret or apply the collective bargaining agreement in resolving his claim. Furby's claim against Chrysler should also not have been dismissed. As a current Chrysler employee seeking a promotion he was a continuing victim of Chrysler's policy of discrimination against persons with his type of actual or perceived mental handicap.

Furby first raised his contention that his HCRA claim against the UAW should not be preempted because that claim could be enforced without interpreting or applying the collective bargaining agreement in his response to the UAW's summary disposition motion. App. H (argument of counsel). Similarly, he raised the applicability of the federal "continuing violations" doctrine, with respect to the Chrysler claim, in his response to Chrysler's motion for summary disposition. App. F (argument of counsel). As can be seen from appendix D and appendix B Furby raised these issues also in the Michigan Court of Appeals

and the Michigan Supreme Court. All of these courts rejected Furby's contentions.

REASONS FOR GRANTING THE WRIT

1. A STATE LAW HANDICAP DISCRIMINATION CLAIM BY A UNION MEMBER AGAINST HIS UNION IS NOT PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHEN THAT CLAIM CAN BE RESOLVED WITHOUT INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND WHEN THE UNION IS ACTING IN THE CAPACITY OF AN EMPLOYER WITH RESPECT TO THE UNION MEMBER?

The Michigan Supreme Court and the Michigan Court of Appeals have decided an important federal question addressing the preemption of state law claims by § 301 of LMRA in a way that conflicts with the decision in *Smolarek* v *Chrysler Corp*, 879 F2d 1326 (CA 6, 1989 en banc) and the decision in *Lingle* v *Norge Div of Magic Chef, Inc*, 486 US 399; 108 S Ct 1877, 1885; 100 L Ed 2d 410 (1988). Although Furby raised the *Smolarek* argument in the trial court, the Michigan Court of Appeals and the Michigan Supreme Court, those courts simply ignored *Smolarek* and made no reference to it.

The United States Supreme Court has addressed the issue the scope of § 301 preemption in a series of cases. These cases are: *Allis-Chalmers Corp* v *Lueck*, 471 US 202, 211; 105 S Ct 1904, 1911; 85 L Ed 2d 206 (1985); *International Bhd of Elec Workers* v *Hechler*, 481 US 851, 859 n.3; 107 S Ct 2161, 2166-67 n.3; 95 L Ed 2d 791 (1987); *Caterpillar, Inc* v *Williams*, 482 US 386; 107 S Ct 2425; 96 L Ed 2d 318 (1987); and *Lingle* v *Norge Div of Magic Chef, Inc*, 486 US 399; 108 S Ct 1877, 1885; 100 L Ed 2d 410 (1988). The *Lingle* court (p 1885 S Ct) stated the **general rule** as "...In sum, we hold that

an application of state law is pre-empted by section 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement." A plain reading of this general rule indicates that plaintiff's claim against the UAW is not preempted because an interpretation of the collective bargaining agreement is not required. Also, see *Smolarek*, below, where the defendant's intellectual attempts to intertwine plaintiff's claim with an interpretation of the collective bargaining agreement were futile. The cited cases also make clear that collateral and peripheral references to a collective bargaining agreement by a plaintiff in stating a cause of action, also do not cause preemption.

Here the UAW has taken on the capacity of a quasi-employer. It jointly decides with Chrysler whether or not a person should be admitted into the skilled trades apprenticeship program and whether that person should be retained within the program. Thus Mr. Furby's claim is controlled by MCL 37.1205; MSA 3.550(205) which states:

> "Sec. 205.
>
> An employer, **labor organization, or joint labor management committee controlling apprenticeship, on the job, or other training or retraining programs shall not discriminate** against an individual because of a handicap in admission to, or employment or continuation in, a program established to provide apprenticeship or other training."

The preemption issue should be determined by answering the question of whether plaintiff's HCRA claim is

tantamount to a breach of duty of fair representation claim. Only this type of claim is preempted. Plaintiff's claim is not such a claim. Plaintiff has shown that the UAW actually partook in the decision to remove him from the skilled trades program. The question of whether this undertaking arose to the level of the UAW being a quasi employer does not even need to be addressed. The fact that plaintiff's claim is not one involving an alleged breach of the union's duty of fair representation is determinative.

Additionally, it appears that the Michigan Court of Appeals and Michigan Supreme Court overlooked *Smolarek* v *Chrysler Corp*, 879 F2d 1326 (CA 6, 1989). In *Smolarek* the court held that the plaintiff's Michigan HCRA claim against his employer, Chrysler Corporation, was not preempted by federal law. Since the UAW is an employer for purposes of appellant's HCRA claim, the rationale of *Smolarek* indicates that appellant's claim against the UAW, just as his HCRA claim against Chrysler, is not preempted.

The Sixth Circuit Court of Appeals decision in *Smolarek* was an en banc decision. The Michigan Court of Appeals and the Michigan Supreme Court were in error in treating the claims against the UAW as amounting to a claim alleging a breach of a union's federal law duty of fair representation. The UAW directly participated in the decision to remove plaintiff from the skilled trades program. This Court should hold that Furby's HCRA claim against the UAW is not preempted by § 301 of the LMRA.

2. THE FEDERAL "CONTINUING VIOLATIONS DOCTRINE" PRECLUDES A STATUTE OF LIMITATIONS DEFENSE AS TO A CURRENT EMPLOYEE REMOVED FROM A DESIRABLE POSITION OUTSIDE OF THE LIMITATIONS PERIOD FOR DISCRIMINATORY REASONS WHEN THAT EMPLOYEE CONTINUOUSLY SEEKS AND IS DENIED REINSTATEMENT TO

THE DESIRABLE POSITION WITHIN THE LIMITATIONS PERIOD.

There has been a clear violation of the "continuing violations doctrine" in this case. Furby is a current Chrysler employee who is being discriminated against each day that he works because Chrysler refuses to allow him into the skilled trades program for discriminatory reasons.

A review of appendix E (order granting summary disposition to Chrysler) and appendix F (hearing transcript pertaining to that motion) shows that Furby's discrimination claim was dismissed for failure to comply with the statute of limitations. There has never been any fact-finding suggesting that Furby was unable to adequately perform the skilled traded job duties. Any such suggestion merely clouds the continuing violations issue unnecessarily.

a. MICHIGAN APPLIES THE FEDERAL CONTINUING VIOLATION DOCTRINE TO DISCRIMINATION CLAIMS

The Michigan courts rely upon federal precedent when interpreting the continuing violations doctrine. At page 376 of *Sumner* v *Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1987) the Michigan Supreme Court stated: "The doctrine was developed by the federal courts in the context of title VII of the federal Civil Rights Act, and continues to play an important role in federal discrimination law. It is therefore appropriate that we, as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision."

b. THE TRIAL COURT MISCONSTRUED THE CONTINUING VIOLATIONS DOCTRINE

The trial court judge was of the opinion that Chrysler's refusal to allow Furby back into the skilled trades program did not constitute an ongoing tort. The trial court judge stated:

> "The continuing violations theory was developed for the purpose of addressing exactly that, continuing

violations. And the reason the theory was developed was because where there are a series of violations of the same nature, you have to make a decision somewhere whether the statute begins to run from the first act or the last one. Because someone could claim, I suppose, that you know if he's harassed that there's a cause of action that the first time that they're harassed and if they don't bring action within three years, then they're out of court.

Well, this doctrine was developed to accommodate in pursuance of the objects of the act to accommodate those people who are subject to repeated violations of the same kind. And they say no, it's the last act.

That's not what's involved in the case at bar. He was only discharged -- terminated once, and he was never readmitted. He was not discharged the second time. There was nothing to revive. The act complained of occurred in nineteen ninety one. The bare fact that he asked for a reversal of that, for Chrysler to change their minds about that act, doesn't revive the statute of limitations because if that were the rule, he could revive it today by asking to be put back into the program and then bring another action three years from now."

c. A CHALLENGE TO SYSTEMATIC DISCRIMINATION IS ALWAYS TIMELY IF BROUGHT BY A PRESENT EMPLOYEE.

The Supreme Court held at p 535 of *Sumner*:

" Similarly, the court in *Reed* v *Lockheed Aircraft Corp*, 613 F2d 757 (CA 9, 1980), reinstated the plaintiff's cause of action where she claimed that the defendant had engaged in a continuous policy against training and promoting women. Her action had been dismissed, since she had never applied for a promotion, and therefore the plaintiff, in the

district court's view, had not alleged a present violation. However, the company ordinarily approached on its own initiative those employees it wished to promote. In overruling the trial court, the court held that the policy constituted a present violation as required by *Evans*. The court opined that

> **'a challenge to systematic discrimination is always timely if brought by a present employee**, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future.' [613 F2d 761. Quoting Elliott v Sperry Rand Corp, supra at 586.]"

d. THIS CASE IS INDISTINGUISHABLE FROM *ROBSON*

The facts in *Robson* (a companion case to *Sumner*) present circumstances which are legally indistinguishable from those present in Mr. Furby's case. Robson was a test driver for General Motors from 1965 to 1978. He had polio induced scoliosis since childhood. In 1978 a new company doctor recommended that Robson be removed from his driving position. He was removed from that position and placed into another job. Robson continuously attempted to obtain reentry into his position as a test driver. In 1982 Robson was laid off from the security department. Had he remained a test driver he would have had enough seniority to avoid being laid off. Robson filed a handicap discrimination suit on June 14, 1982. This was more than three years beyond his December 7, 1978 removal from the test driver position. The trial court granted summary judgment to General Motors holding that Robson's cause of action accrued on December 7, 1978 when he was removed from the test driver position. Thus the three year statute of limitations period had expired six months before

Robson filed suit. The Court of Appeals affirmed this decision. The Michigan Supreme Court reversed. The Supreme Court held at p 537 of *Sumner*:

> " Plaintiff in this case claims that he was removed from his position on the basis of a discriminatory policy. The fact that he sought to be retransferred on a number of occasions and that company physicians repeatedly found him unfit for test driving is evidence that this policy, its application, and the resultant deprivation continued well into the limitation period. The grant of summary judgment for defendant is therefore reversed."

Similarly, Mr. Furby was removed from the skilled trades program on June 21, 1991. He continuously attempted to obtain readmission into the program without success. This is evidence that Chrysler's discriminatory policy, its application and the resultant deprivation continued well into the limitation period. As in *Robson*, Mr. Furby remained an employee after his removal from the desired position.

e. CHRYSLER'S REFUSAL TO REINSTATE FURBY INTO THE SKILLED TRADES PROGRAM CONSTITUTES A PRESENT A VIOLATION

The Michigan Court of Appeals concluded that the continuing violations doctrine does not apply because plaintiff has not established a discriminatory act within the limitations period. The gist of *Acha, Reed* and *Robson* is that a current employee who was denied a promotion for discriminatory reasons has established a present a violation as a matter of law. This Court should grant petitioner relief because the Michigan decision regarding the "continuing violations doctrine" in this case conflicts with *Acha, Reed* and *Robson*.

CONCLUSION

Petitioner requests that this Honorable Court grant his

Petition for Writ of Certiorari; determine that his HCRA claim against the UAW is not preempted by § 301 of the Labor Management Relations Act; determine that his HCRA claim against Chrysler is not barred by the statute of limitations because of the continuing violations doctrine; remand this matter for trial; and grant any other relief agreeable to equity and good conscience to which Petitioner may be entitled.

Respectfully submitted,

ZALECKI AND BAIR, P. C.

/s/_____
GREGORY T. ZALECKI
Attorney for Petitioner
12900 HALL RD., SUITE 415
STERLING HEIGHTS, MI 48313
(810) 254-6113